



Why I Won't Be a Prime Contractor

John Krieger

Because I don't have to.
It is as simple as that.

You may wonder why I wrote this article. (Actually, I did too—but probably for different reasons.) So, before we proceed any further, let me provide the genesis. Dr. D. Mark Husband, senior advisor, Root Cause Analyses, Office of Performance Assessments and Root Cause Analyses (PARCA) asked the Defense Systems Management College (DSMC) to gather “subject matter experts” (SMEs) from various career fields to discuss issues related to doing business with the federal government, specifically the Department of Defense. I was invited to discuss contracting issues.

The discussion was in support of the Better Buying Power (BBP) 2.0 effort to achieve greater efficiency and productivity in defense spending. Frank Kendall, Under Secretary of Defense for Acquisition, Technology, and Logistics (USD[AT&L]),

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sent letters to the chief executive officers of major defense contractors seeking similar information. During one part of the discussions, I made the bold assertion that I wouldn't contract with the federal government as a prime contractor. We discussed that for a time and moved on.

Shortly after that gathering, my supervisor, manager and the dean of DSMC received an e-mail from Dr. Husband on the topic (i.e., Subject: Request for info from John Krieger iso of USD(AT&L) study on "Eliminating Requirements Imposed on Industry Where Costs Outweigh Benefits"). He wanted a white paper on my thoughts and rationale on why I wouldn't contract directly with the federal government. My initial, flip response was "Look at the table of contents of FAR Part 52 and DFARS Part 252. Is that short enough for a White Paper?" He heeded my suggestion. It gave him a headache. But, he asked for more. The "more" is found below.

I make a comfortable living when you consider my salary as a reemployed annuitant, intermittent professor of contract

management at the DSMC, leading sessions of The FAR Bootcamp, and occasional consulting. With the wages and payments I receive, combined with my civil service retirement pay, my income exceeds my needs. Why would I want to inflict contracting with the federal government on myself? Just so we are clear on what I mean, consider the first two definitions of "inflict":

verb (used with object) 1. to impose as something that must be borne or suffered: to inflict punishment. 2. to impose (anything unwelcome): The regime inflicted burdensome taxes on the people. (Dictionary.com)

As I am not (particularly) greedy, the answer to the question is, "No reason." If I were younger, more ambitious, it might be different.

Let's look at why I use the term "inflict" in relation to contracting with the federal government. The table in this article compares contracting with the federal government and contracting

Table 1. Comparison of Federal Government and Commercial Contracting Requirements

Federal Government Contracting Requirements	Commercial Contracting/Subcontracting Requirements
<p>Rules:</p> <p>Federal Acquisition Regulation (FAR)—1,885 pages Defense FAR Supplement (DFARS)—1,308 pages DFARS Procedures, Guidance and Information (PGI)—657 pages Deviations (34)—177 pages Air Force Federal Acquisition Regulation Supplement (AFFARS) Air Force Materiel Command Mandatory Procedures and Information Guidance (AFMC MP/IG) Air Force Life Cycle Management Center 645th Aeronautical System Group</p> <p>Notes:</p> <ul style="list-style-type: none"> For the Navy, Army or a Defense Agency, everything below the DFARS will be a different set of supplements. For any Executive Agency outside of the DoD, everything below the FAR will be a different set of supplements. Deviations, which have not been published for public comment, may affect me as a contractor. AFMC MP/IG is locked (unavailable) on the FARSite. Page counts as of June 26, 2014. <p>(For all notes, see "Contra Proferentem and the Christian Doctrine," below.)</p>	<p>Rules:</p> <p>Uniform Commercial Code (UCC)—270 pages Note: The UCC deals with multiple aspects of commerce (i.e., sales, leases, negotiable instruments, bank deposits and collections, funds transfer, letters of credit, bulk sales, documents of title, investment securities, and secured transactions). The portion that would match the FAR's procurement contracts is Article 2, Sales—70 pages.</p>
<p>Rate of Rule Change:</p> <p>77 Federal Acquisition Circulars (FACs) issued since the March 2005 reissuance of the FAR. [Through FAC 2005-77]</p> <p>Changes can be extensive. For example, FAC 2005-73 was 642 pages long.</p> <p>174 Defense FAR Supplement Publication Notices, previously designated as Defense FAR Supplement Change Notices, issued since the January 2008 reissuance of the DFARS. [Through DPN 20141106]</p> <p>(See "Contra Proferentem and the Christian Doctrine," below.)</p>	<p>Rate of Rule Change:</p> <p>Article 2 of the UCC was issued in 2002.</p>
<p>Potential Solicitation Provisions and Contract Clauses that may be used, excluding alternates:</p> <p>FAR 580 DFARS 341</p> <p>Notes:</p> <ul style="list-style-type: none"> Even with many clauses incorporated by reference, Section I of a Uniform Contract Format (UCF) will go on for pages and pages. Many FAR and DFARS clauses require that they be "flowed down" below the level of the prime contractor. In some instances, that will be to subcontractors, where applicable, at any tier. 	<p>Potential Solicitation Provisions and Contract Clauses that may be used, excluding alternates:</p> <p>UCC 0</p> <p>Notes:</p> <ul style="list-style-type: none"> On two occasions in the last four years, I have had written contracts containing clauses. One of those two was a subcontract to a federal government contract. There is the potential for the "battle of the forms." You will have experienced this whenever you have made a major purchase (e.g., large appliance, car, home). Read the fine print.

in the commercial or private sector. In the right-hand column of each pair, "commercial" does not refer to commercial item acquisition as discussed in Federal Acquisition Regulation (FAR) Part 12, but to contracting with private, for-profit organizations.

In the table, the requirements associated with contracting with the federal government are in the left column and those associated with commercial contracting or as a subcontractor are in the right column.

Not mentioned in the table are some other concerns (e.g., bureaucracy, current competency of federal personnel and their

market knowledge). All have a tendency to detract from the experience of doing business with the federal government.

So, why then do people contract with the federal government?

- It's the only game in town for them. Some products and services (e.g., tanks, bombers, aircraft carriers) are of such a nature that the federal government is the only customer.
- To diversify their portfolios and protect against downturns, or other issues, in a single market (i.e., having many eggs in many baskets). For example, the Boeing Company building both commercial and military aircraft.

Table 1 (Continued).

Federal Government Contracting Requirements	Commercial Contracting/Subcontracting Requirements
<p>Registering to be able to contract: To do business with the federal government, I was required to get a Tax Identification Number (TIN). In addition to my TIN, I was required to obtain a Data Universal Numbering System Number (i.e., DUNS Number). Having a TIN and a DUNS Number allowed me to go through the onerous, and time consuming, process of entering my data in the System for Award Management (SAM). Once entered in SAM, this data must be updated at least annually. Passwords are only good for six months. Note: Failure to accurately complete the data in SAM could result in a violation of the civil False Claims Act (FCA), which carries a penalty of treble damages.</p>	<p>Registering to be able to contract: I have a TIN for tax purposes.</p>
<p>Competition: FAR Part 6 implements the Competition in Contracting Act (CICA), which require full and open completion. Absent CICA, still "The contracting officer must promote competition to the maximum extent practicable . . ." (FAR 13.104) No brand loyalty. If you do an excellent job, the best you can hope for is a good past performance review, which may help in a future source selection.</p>	<p>Competition: I have never had to participate in a competition to be selected for contracted or subcontracted work.</p>
<p>Contract Formation: Time to contract: Days (atypical) Weeks Months Years Proposal Requirements: Proposal requirements for the federal government can be quite extensive. Just completing, or verifying, representations and certifications can be a chore. There will be a requirement for a cost proposal to justify price. Above \$700,000, certified cost or pricing data may be required under the Truth in Negotiations Act, 41 U.S.C. chapter 35. Now referred to in the FAR as "Truthful Cost or Pricing Data." In addition, there may be requirements for technical and management proposals and others (e.g., risk). Negotiations: Negotiations may be simple or wide ranging. They will probably include discussion of price, including profit. Although there is no limitation on profit or fee, except for cost-plus-fixed-fee contracts, the government will be guided by a "structured approach" for prenegotiation objectives. Overall, this process can be costly in time and money to the offeror, as can be demonstrated by some of the settlements the government has reached for paying proposal preparation costs.</p>	<p>Contract Formation: Time to contract: Minutes Hours Days (atypical) Solicitation/Contract Instrument: Many of my contracts are oral. Written contracts are quite short. My longest contract was six pages. Proposal Requirements: I have only submitted a proposal (i.e., statement of objectives, and price) on one occasion. Total submittal, one page. Negotiations: Very limited. Overall, this process is much less costly in time and money. In the majority of my contracts, this has been negligible.</p>
<p>Accounting Requirements: As a federal government contractor, I would have to maintain an acceptable accounting system. Depending on the dollar amount and type of contract, that system would be subject to approval and audit. To help, the government provides guidance in the form of Defense Contract Audit Agency Pamphlet No. 7641.90, <i>Information for Contractors</i>. The pamphlet is 100 pages long. If I got enough business, I would be subject to the Cost Accounting Standards (CAS). Certain contractors and subcontractors are required to comply with CAS and to disclose in writing and follow consistently their cost-accounting practices. In addition, for cost-reimbursement contracts, Contract Cost Principles are applicable. The cost principles are a set of 46 rules applicable to deciding whether contractor costs are allowable.</p>	<p>Accounting Requirements: I keep an Excel spreadsheet, which is subject to no one's review, but my own. I have never been questioned concerning allowability of cost.</p>

- To leverage federal government research and development dollars for infusion into commercial products and services.
- The return on assets employed is great in the sense that the government pays you for the assets you employ. If you have many contracts, the rate of return is predictable. Remember that the owners of some government contractor firms are largely widows and orphans and retired public employees, including some from Canada, if you look at the institutional investors.
- Patriotism. I have it from a usually reliable source (one of my brothers) that a major commercial firm built telescopes/

cameras for spy satellites out of patriotism, though the company wasn't allowed to talk about it.

- (Unlike me) for additional money. After all, as Willie Sutton is purported to have said, but didn't, about why he robbed banks, "That's where the money is."

Whatever the reason, there is one thing I do know: If I were to decide to become a prime contractor with the federal government, the first thing I would do is hire someone like me to ensure that I followed the rules. By the way, my mobile phone is 703-772 ---- &

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Table 1 (Continued).

Federal Government Contracting Requirements	Commercial Contracting/Subcontracting Requirements
<p>Payment: Payment in federal government contracts is governed by the Prompt Payment Act, a statute enacted to delay payment of the government's bills. Payment is the later of: (A) The 30th day after the designated billing office receives a proper invoice from the contractor. (B) The 30th day after government acceptance of supplies delivered or services performed. Requires use of electronic funds transfer (EFT), and Wide Area Workflow (WAWF). The WAWF approval process is daunting.</p>	<p>Payment: Payment is much quicker. In most cases, it is my choice whether I am paid by EFT or check. For my most favored customer, if I invoice on Saturday, I am paid before the next Saturday (i.e., less than seven days). Only two customers have required electronic submission of billing information. One of those was a subcontract on a federal government contract.</p>
<p>Contract Interpretation: Includes standard procedures for contract interpretation (e.g., Order of Precedence Rule, Express Language Rule, Conduct of the Parties, Prior Course of Dealings Rule, Whole Instrument Rule, Contra Proferentem*). In addition to the standard procedures for contract interpretation, in federal government contracting there is application of the "Christian Doctrine."** The Christian Doctrine ignores the "four corners" of the contract to establish meaning.</p> <p>* Used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language. (Black's Law Dictionary, Sixth Edition.)</p> <p>** A legal rule providing that clauses required by regulation to be included in government contracts will be read into a contract whether or not physically included in the contract, unless a proper deviation from the regulations has been obtained. (<i>The Government Contracts Reference Book</i>, Fourth Edition.)</p>	<p>Contract Interpretation: Includes standard procedures for contract interpretation, but no Christian Doctrine.</p>
<p>Litigation: This may be the one area in which the federal government excels. The most commonly used (i.e., by the Government Accountability Office, Court of Federal Claims, Boards of Contract Appeals) have a significant amount of statutes, regulations and case law on which to rely. Between protests and disputes, there is a large amount of litigation in federal government contracting. I have been lucky, having only been involved in such litigation on four occasions. A federal government contract can be liable to litigation for a time. In one instance, I was contacted by Air Force lawyers 11 years after I had left the program involved. I was contacted 16 years later in another case. Contractors are subject to the FCA, the "Lincoln Law," which includes treble damages. Under the FCA, qui tam lawsuits can be initiated by whistleblowers who hope to receive a portion of any recovered damages.</p>	<p>Litigation: Litigation is done at the state and local level. Judges may have limited or no experience in contract law. Case law may differ from state to state, locality to locality. Litigation, however, is rare, as parties seek to resolve differences. In some instances, the written word of the contract may be ignored in order to reach a settlement. I have never been involved in a protest or dispute.</p>
<p>Changes: Federal government contracts contain a changes clause that allows the government to unilaterally change the contract, without the contractor's consent, in specifically enumerated areas. Such changes are subject to an equitable adjustment; however, the contractor must assert its right to the adjustment under the changes clause within 30 days from receipt of the written order. The contractor must continue work, as changed, even if it disagrees that the work should be done.</p>	<p>Changes: All changes must be by mutual agreement of the parties, otherwise it is a breach of contract.</p>
<p>Termination: Federal government contracts contain a termination for convenience clause that allows the government to terminate this contract, in whole or in part when it is in the government's interest.</p>	<p>Termination: All terminations must be by mutual agreement of the parties, otherwise it is a breach of contract.</p>
<p>Limitation on Allowable Government Contractor Compensation Costs, \$487,000 per fiscal year, adjusted annually.</p>	<p>[It's the thought that counts.]</p>
<p>Renegotiation: As if all the above were not enough, if the federal government believes it "got taken," the contract may be subject to renegotiation by a Renegotiation Board.</p>	<p>[It's the thought that counts.]</p>
<p>Note: Admittedly, for the three years that I was a member of the Navy's Renegotiation Board we never met.</p>	